

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KAMAL VINCENT BROWN,

Defendant-Appellee.

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UNPUBLISHED

April 26, 2016

No. 328560

Wayne Circuit Court

LC No. 03-005782-FC

Before: BECKERING, P.J., and OWENS and K. F. KELLY, JJ.

PER CURIAM.

In 2003, defendant was convicted in a jury trial of second-degree murder, MCL 750.317, felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to 35 to 50 years' imprisonment for the second-degree murder conviction, 1-1/2 to 5 years' imprisonment for the felon-in-possession conviction, and two years' imprisonment for the felony-firearm conviction. This Court affirmed defendant's convictions and sentences. *People v Brown*, unpublished opinion per curiam of the Court of Appeals, issued December 14, 2004 (Docket No. 251614). The Michigan Supreme Court denied leave to appeal. *People v Brown*, 474 Mich 853; 702 NW2d 578 (2005). On March 20, 2013, defendant filed a motion for relief from judgment pursuant to MCR 6.500 in the trial court. The prosecution appeals by delayed leave granted<sup>1</sup> the court's June 25, 2015 opinion and order granting defendant's motion for relief. We reverse.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises out of the November 30, 2002, shooting death of Mario Smith (Mario). During defendant's trial, conducted in 2003, the prosecution presented testimony from Chavez Smith (Chavez), who testified that he witnessed the shooting. Chavez recalled seeing defendant in a green Pontiac Grand Am in the parking lot of Skateland, Mario's place of employment, and

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<sup>1</sup> *People v Brown*, unpublished order of the Court of Appeals, entered August 31, 2015 (Docket No. 328560).

that defendant and Mario got into an argument about a young woman. Defendant eventually left in the Grand Am, and Mario, after finishing his shift, began walking through the neighborhood.

A short time later, Chavez, who had been walking around the neighborhood for a period of time, saw Mario on a street corner, approximately one block away from him. Chavez saw defendant drive the same green Grand Am to the corner, stop, point a handgun at Mario, and fire approximately four to six shots. Chavez described the handgun defendant used as a “nickel-plated” revolver; he did not specify the caliber of the firearm. Chavez recognized the handgun because defendant attempted to sell him the weapon two days before the shooting.

Adrian Walker, who knew Mario from school, testified that he saw Mario leaving the Skateland parking lot on the night of the shooting. As Mario left, someone in a green Pontiac Grand Am approached him and told him to get into the vehicle; Mario refused. Later, Walker left Skateland and went to a gas station in order to use a payphone to summon a ride home. While he was at the gas station, he saw the same green Grand Am. The passenger of the vehicle, later identified as defendant, got out of the vehicle. As he did so, a handgun fell from the right pocket of his hooded sweatshirt. When asked if he would agree the gun he saw at the gas station was a semiautomatic, rather than a revolver, Walker said he did not know the difference between the two types of handguns. Walker agreed that he told a police officer that the weapon used was either a .38, .380, or 9 millimeter. He also testified that the weapon looked similar to a gun that his cousin owned.

With regard to the shooting, Walker recalled that he was walking after he telephoned his grandmother for a ride, and he saw Mario and the same green Grand Am a short distance ahead of him. According to Walker, “a guy,” got out of the Grand Am and fired a single shot at Mario. Walker did not describe the “guy,” who shot Mario, but said he got out of the passenger side of the vehicle.

As noted above, defendant was convicted by a jury, and this Court affirmed his convictions. On March 20, 2013, defendant filed a motion for relief from judgment in the trial court. Pertinent to this appeal, defendant alleged that he was entitled to relief from judgment because the prosecution failed to disclose a ballistics report stating that the weapon used to kill Mario was a .22-caliber handgun.<sup>2</sup> According to defendant, withholding the ballistics evidence amounted to a *Brady*<sup>3</sup> violation. Defendant argued that the ballistics evidence could have been used to further impeach Chavez and Walker’s testimony that the gun used to shoot Mario was either a .38, .380, or 9 millimeter.<sup>4</sup>

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<sup>2</sup> It has never been disputed that a ballistics report existed before trial, but was not given to defendant.

<sup>3</sup> *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

<sup>4</sup> We note that defendant’s argument does two important, but factually incorrect, things. First, it appears to combine Chavez and Walker’s testimony about the caliber of the weapon used in the shooting. Second, it appears to suggest that Chavez himself testified that he saw defendant use a

In support of his motion, defendant also argued that his trial counsel was ineffective for failing to call Handson Fields and Louis Horton as witnesses at trial and for failing to review police reports and find certain statements by Fields and Horton. According to a police report attached to defendant's motion, Horton told police officers that at approximately 8:00 p.m. on the night of the shooting, Mario "had words" at Skateland with a young boy who was approximately 11 years old. Horton also told police officers that he saw a green Grand Am in the Skateland parking lot on the night of the shooting, but he did not know the occupants of the car; he was, however, familiar with defendant because of defendant's association with the "East Warren Posse" gang. According to defendant, Horton's statements could have led to testimony that would have contradicted Chavez's testimony about defendant having an altercation with Mario on the night of the shooting.

As to Fields, defendant attached a police report indicating that Fields observed the shooting, but described it as occurring at a different street corner than the one described by Chavez. Fields also told police officers that he saw two people behind the green Grand Am involved in the shooting. Although Fields did not identify the shooter, he described the shooter as being a young, African-American male who was approximately 5'8" tall, weighing approximately 150-165 pounds.<sup>5</sup> Fields also stated that Mario ran away after he was shot. According to defendant, Fields's statement to police showed that Fields could have testified in a way that contradicted Chavez's account of where and how the shooting occurred.

Following an evidentiary hearing at which defendant, his trial counsel, and his original appellate counsel testified, the trial court granted defendant's motion for relief from judgment. With regard to the ballistics report, the trial court found that defendant could establish a *Brady* violation because the evidence would have been favorable to defendant for impeachment purposes. The court explained that, "Chavez Smith, an eyewitness to the shooting, originally stated to the police that [defendant] had used a nickel-plated .38 caliber with a black handle that was kept in [defendant's] bedroom closet in a black suit bag." The court also noted that defendant had attempted to sell Chavez the same gun two days before the shooting, and that defendant had used the same gun during the shooting. Noting that Walker made statements about the gun he saw defendant drop at the gas station as being either a 9 millimeter, a .380, or a .38, the court concluded that the ballistics report—indicating Mario was killed by a .22-caliber bullet—would have given defense counsel a basis to impeach Chavez and Walker.

Given the fact that the ballistics report existed at the time of trial but was not given to defendant, the court found defendant could establish good cause under MCR 6.508(D)(3)(a) for failing to raise the report in an earlier appeal. As to whether defendant could show actual prejudice under MCR 6.508(D)(3)(b), the court opined that, standing alone, the ballistics report did not amount to actual prejudice. However, the court ruled that the ballistics report, combined with claims of ineffective assistance of counsel relating to Fields and Horton, was enough to

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.38-caliber handgun. As will be discussed, we find no record support for any assertion that Chavez testified about the caliber of the handgun, let alone described the gun used as a .38-caliber handgun.

<sup>5</sup> As was later borne out at an evidentiary hearing, defendant matched this description.

meet the actual prejudice threshold. The court noted that both Fields and Horton's statements were made available to defendant's trial counsel, but defendant's trial counsel did not utilize the statements or call either individual as a witness at trial. For this, the court concluded, defendant's trial counsel was ineffective, because Fields's statement could have provided an eyewitness account of the shooting that differed from Chavez's account, and because Horton's statement indicated that Mario had an argument with someone other than defendant on the night of the shooting, and that Horton did not associate defendant with the green Grand Am that played a prominent role in the events that occurred on the night of the shooting.

## II. ANALYSIS

On appeal, the prosecution argues that the trial court abused its discretion by granting defendant's motion for relief from judgment because it based its decision on clearly erroneous findings of fact and misapplied the correct legal standards. We agree.

### A. STANDARD OF REVIEW

This Court reviews a trial court's decision to grant a motion for relief from judgment for an abuse of discretion. *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes, or makes an error of law." *People v Swain*, 288 Mich App 609, 628-629; 794 NW2d 92 (2010) (citations omitted). A trial court's findings of fact are reviewed for clear error. *McSwain*, 259 Mich App at 681-682. "[F]indings of fact are clearly erroneous if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *Id.* at 682, quoting *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991).

### B. MCR 6.508(D)

Under MCR 6.508(D), a defendant bears the burden of establishing entitlement to relief from judgment. MCR 6.508(D); *People v Clark*, 274 Mich App 248, 251; 732 NW2d 605 (2007). MCR 6.508(D) provides, in pertinent part:

The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

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(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, “actual prejudice” means that,

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

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(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;

\* \* \*

The court may waive the “good cause” requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

Thus, to establish entitlement to relief from judgment, defendant had to demonstrate good cause for not raising the issues in his motion for relief on appeal from his conviction, and actual prejudice as a result of the irregularities alleged in the motion.

Here, there is no dispute that defendant can establish good cause in regard to the ballistics report, which was never disclosed to him before trial. However, in all other respects, we disagree with the trial court’s conclusions. We hold that the court abused its discretion by granting defendant’s motion for relief from judgment. It based its decision on clearly erroneous findings of fact, and erred by concluding that trial counsel was ineffective for not investigating and calling Horton and Fields as witnesses at trial.

### C. BALLISTICS EVIDENCE

As noted, the prosecution concedes good cause in regard to the undisclosed ballistics evidence. It contests the trial court’s findings utilized in regard to concluding that the ballistics report contributed to a showing of actual prejudice.

To establish actual prejudice, defendant had to demonstrate that, but for the prosecution withholding the ballistics evidence, he would have had a reasonably likely chance of acquittal, or “the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case.” MCR 6.508(D)(3)(b)(i) and (iii). See also *McSwain*, 259 Mich App at 680. Defendant argued in his motion for relief that the prosecution’s withholding of the ballistics evidence amounted to a *Brady* violation, and that but for the violation, he would have had a reasonably likely chance of acquittal.

For a *Brady* violation, a defendant must demonstrate: “(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) viewed in its totality, is material.” *People v Chenault*, 495 Mich 142, 155; 845 NW2d 731 (2014). Suppressed evidence may be considered favorable to a defendant if it could be used as impeachment evidence. See *id.* at 156. For

materiality, “[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Id.* at 157 (quotation marks and citation omitted).

The trial court concluded that the ballistics report—which indicated that Mario was killed with a .22-caliber bullet—would have been favorable to defendant for impeachment purposes. In making this determination, the court found that Chavez “originally stated to the police that [defendant] had used a nickel-plated .38 caliber with a black handle that was kept in [defendant’s] bedroom closet in a black suit bag.” Because Chavez testified that he was familiar with the weapon after defendant had tried to sell it to him the night before, the court concluded that evidence demonstrating that Mario had been killed by a different caliber handgun than was suggested by Chavez would have undercut Chavez’s testimony. Further, the court found that Walker testified he thought the gun dropped by defendant at the gas station was a 9 millimeter or .380; evidence that defendant was shot with a .22-caliber weapon would have impeached Walker’s testimony in this regard, reasoned the court.

The trial court’s findings of fact made in assessing the importance of the ballistics evidence were clearly erroneous. There is no evidence in the record that Chavez ever described the gun he saw defendant use to shoot Mario as a .38 caliber. At trial, Chavez described defendant’s weapon as a “nickel-plated handgun” and a “revolver.” Chavez never mentioned the caliber of the weapon used in the shooting. Moreover, on the record provided to this Court, there is no indication that Chavez ever made a statement to police officers about the caliber of the weapon used in this shooting.<sup>6</sup> In his statement to police on April 1, 2003, Chavez stated that defendant pointed a nickel-plated handgun out of the Grand Am’s window and shot Mario, and that the gun was kept at the house of defendant’s father. Again, Chavez did not mention the caliber of the handgun in this statement. Therefore, evidence that the bullet removed from Mario’s chest was a .22 caliber would not have been useful for impeaching Chavez, as Chavez never testified or gave a statement describing the caliber of the gun defendant used to shoot Mario.

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<sup>6</sup> We note that defendant, in a letter to the trial judge in which he requested appointed counsel for purposes of filing a motion for relief from judgment, asserted that certain prosecution witnesses represented that he used a nickel-plated .38 caliber handgun to shoot Mario. Defendant’s letter cited witness statements in which handguns are discussed. It is unclear from the first witness statement who made the statement; it appears to have come from an individual named “Frank Evans,”—who did not testify at trial—not Chavez. That first statement describes a *different* shooting and describes the gun defendant used in *that* shooting as a nickel-plated .38 caliber handgun with a black handle. The other witness statement pertained to the instant case, and was from Walker, who stated that the gun used in the instant case was either a .38 or .45 caliber. Again, there does not appear to be any statements from Chavez that the gun defendant used to shoot Mario was a .38 caliber.

We are also unmoved by the value of the ballistics report, if any, as impeachment evidence with regard to Walker. Walker described the gun he saw defendant drop at the gas station as a .38, .380, or 9 millimeter. However, from Walker's testimony, one could conclude that he had minimal knowledge of firearms because he said that he did not know the difference between a semiautomatic and a revolver. This was reinforced by the fact that Walker simply assumed the gun was one of the calibers listed above because it looked somewhat similar to a gun his cousin had. That the fatal shot fired in this case came from a .22-caliber gun does little to impeach testimony from a witness who admitted he knew little about guns and was essentially guessing as to the caliber of the weapon he saw defendant possess at a gas station shortly before the shooting.

Thus, the trial court erred in determining that, under *Brady*, the withheld ballistics evidence would have been both favorable to defendant and material, because it based its conclusion on clearly erroneous findings of fact.

#### D. INEFFECTIVE ASSISTANCE OF COUNSEL

We are also in disagreement with the trial court's conclusion that any alleged ineffective assistance provided by trial counsel with regard to Fields and Horton amounted to good cause,<sup>7</sup> or that any alleged deficient representation could contribute to a finding of actual prejudice.

To evaluate a claim of ineffective assistance of counsel, this Court uses the standard established in *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999), citing *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). For a successful claim of ineffective assistance of counsel, the defendant must show: "(1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). The effective assistance of counsel is presumed, *People v Roscoe*, 303 Mich App 633, 644; 846 NW2d 402 (2014), and a defendant must overcome the presumption that defense counsel's actions were the product of sound trial strategy. *Trakhtenberg*, 493 Mich at 52. "[D]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy" that this Court should "not second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (quotation marks and citations omitted).

In its opinion granting defendant's motion for relief from judgment, the trial court concluded that defense counsel's failure to investigate Horton and Fields or call them as witnesses was not sound trial strategy. It found that, in his statement, Horton said Mario had an argument with someone other than defendant on the night of the shooting, and that he did not associate defendant with the green Grand Am. This, according to the trial court, impeached

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<sup>7</sup> The "good cause" requirement of MCR 6.508(D)(3)(a) can be established by a showing that counsel was ineffective. *Swain*, 288 Mich App at 631.

Chavez's testimony about defendant's alleged motive for the shooting—an argument between defendant and Mario. As to Fields, the court found that Fields gave an eyewitness account of the shooting that differed from Chavez's account. The court asserted that, if defense counsel's strategy was to discredit Chavez, he should have made an effort to investigate these witnesses, or provided a more plausible explanation at the evidentiary hearing as to why he had not done so.

We agree with the prosecutor's assertion that defendant failed to overcome the presumption that defense counsel's decision not to call Horton and Fields as witnesses at trial amounted to sound trial strategy. Initially, neither Horton nor Fields testified at the evidentiary hearing regarding what they would have testified to had they been called at trial. Nor has defendant provided any affidavits from the two individuals. Further, even if they had both testified consistent with their witness statements, trial counsel may have reasonably concluded that the testimony would have been more harmful than beneficial. In his statement, Horton said Mario told a young boy to leave Skateland on the night of the shooting, and that Mario and the boy "had words." This statement does not necessarily contradict anything Chavez testified to at trial. Indeed, that Mario argued with a young boy at Skateland does not discount the possibility that he could have argued with someone else, i.e., defendant.

Further, we note that any statement Horton made about defendant and the green Grand Am does not give us any reason to conclude that trial counsel's decision not to investigate or call Horton as a witness was objectively unreasonable. In a preliminary complaint report involving Horton, the police officer who wrote the report indicated that Horton knew defendant because of defendant's association with the East Warren Posse gang. Despite his familiarity with defendant, Horton did not choose defendant from a lineup when asked to identify persons associated with the green Grand Am. Defense counsel may have properly considered the gang association in his decision not to call Horton as a witness at trial. Defense counsel even confirmed as much at the evidentiary hearing.<sup>8</sup>

In addition, even assuming that: (a) Horton would testify consistently with his statements; and (b) counsel was objectively unreasonable for failing to call Horton as a witness, we discern no prejudice from failing to call Horton as a witness at trial. As noted above, Horton's testimony did not impeach Chavez's testimony about defendant having an argument with defendant; it simply introduced the possibility that an 11-year-old boy might have "had words" with Mario at Skateland. Further, the police report regarding defendant and the green Grand Am observed at Skateland was very vague. Notably, it simply says that Horton did not "associate" defendant with the green Grand Am. This is not altogether that different from Chavez's trial testimony, in which Chavez stated that he was familiar with the green Grand Am, but had never seen defendant in the vehicle before the shooting. Although defendant wishes to construe Horton's

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<sup>8</sup> And, because defendant has not produced any testimony or affidavits from Horton regarding any testimony he could have given beyond his statements in his police report, we also decline to find that counsel was ineffective with regard to any alleged lack of investigation into Horton before trial. See *Hoag*, 460 Mich at 6 (the defendant bears the burden of establishing the factual predicate for his claim).

statements in the police report as excluding defendant from being in the Grand Am on the evening of the shooting, such a conclusion is not apparent from the police report itself, and defendant has not provided any evidence—he did not call Horton as a witness at the evidentiary hearing, nor did he provide an affidavit from Horton—to suggest otherwise.

Similarly, we cannot conclude that defendant’s trial counsel was ineffective with regard to failing to investigate or call Fields as a witness. Fields’s statement gave a description of the location of the shooting that was different than the location where Chavez said the shooting occurred. Fields also stated that two individuals were outside of the green Grand Am at the time of the shooting, and that Mario ran after he was shot. Although Fields could not identify the shooter, his statement gives a description of the shooter that, as defendant admitted at the evidentiary hearing, matched his description. This description could have been harmful to defendant at trial. Given that Fields’s statement indicated that defendant matched the description of the shooter, defendant’s trial counsel was not objectively unreasonable for failing to call Fields as a witness. And defendant has not provided us with any evidence to suggest that counsel’s investigation, or lack thereof, was objectively unreasonable. See *Hoag*, 460 Mich at 6.

Moreover, we can discern no meaningful prejudice to defendant from any failure to call Fields. The benefit from any testimony about the location of the shooting would have been minimal, at best. Although Fields could have contradicted Chavez’s account of the manner in which the shooting occurred—Fields stated that two individuals were outside of the car and that Mario ran after being shot, while Chavez testified that defendant remained in the car during the shooting and did not run far—such contradiction would have been largely cumulative to Walker’s testimony. Indeed, Walker testified that the shooter got out of the vehicle before firing the fatal shot, whereas Chavez testified that the shooter remained in the vehicle. Finally, any minimal benefit that Fields could have provided is, from the record before us, offset by the idea that Fields provided a description of the shooter that matched defendant’s description. Accordingly, we discern no prejudice from any alleged failure to call Fields as a witness at trial.

In sum, the trial court erred in finding that defense counsel’s failure to call Fields and Horton as witnesses amounted to ineffective assistance and in finding that defendant established good cause and prejudice for not raising the ineffective assistance of counsel claim on appeal.<sup>9</sup> Thus, the court abused its discretion in granting defendant’s motion for relief from judgment.

### III. CONCLUSION

Although defendant can establish good cause under MCR 6.508(D)(3)(a) with regard to the withheld ballistics report, the trial court’s factual findings about the importance of this evidence were clearly erroneous. Additionally, the trial court erred in finding that defendant could establish ineffective assistance of counsel and that counsel’s alleged deficiencies amounted

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<sup>9</sup> For the same reasons, we reject any claim made by defendant in his brief on appeal that his original appellate counsel was ineffective with regard to Fields or Horton.

to either good cause or actual prejudice under MCR 6.508(D)(3). Accordingly, we find that the trial court abused its discretion when it granted defendant's motion for relief from judgment.

Reversed.

/s/ Jane M. Beckering  
/s/ Donald S. Owens  
/s/ Kirsten Frank Kelly